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In the Supreme Court of the United States

October Term, 1957

No. 367

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY, and CHICAGO & NORTH WESTERN RAILWAY COMPANY,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS RESISTING PETITION FOR CERTIORARI

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Respondents, W. E. Williams and Union Pacific Railroad Company, have filed briefs resisting the petition for certiorari. Respondent, Chicago and North Western Railroad Company, has advised counsel for Petitioner that no resistance will be filed on its behalf.

Respondents' resistances to the petition for certiorari demonstrate, we believe, that this Court should exercise its discretion to review the judgments of the Courts below, so that an authoritative and final determination of the scope of Rules 20, 21, 38 and 42(b) may be laid

down for the benefit of the legal profession, and Federal tribunals administering these rules. Respondents' Briefs also demonstrate the importance to the public of a review by this Court of the questions of petitioner's liability and that of Union Pacific for the injuries suffered by respondent Williams.

I.

Under this division of their resistances both respondents contend that although Williams filed timely demand for a jury trial "of any issue in the above entitled cause triable of right by a jury" (see R. 18) his demand was insufficient, under Rule 38 (c) and (d), to entitle petitioner to a jury trial upon its crossclaims against its co-defendants. Counsel urge that the crossclaims of defendants were a lawsuit, distinct and separate from Williams' suit against the three defendants, and that, in the absence of a demand for jury trial by one or more defendants upon their crossclaims, they were not to be tried to a jury at the time Williams' case was heard.

This contention ignores the fundamental purpose of the Federal Rules as to crossclaims, which is to have all questions disposed of in a single trial, with a minimum of expense, and as speedily as possible, consistent with the proper administration of justice. This contention is not supported by Rule 38. An examination of that rule, in its entirety, demonstrates the error in counsels' logic. If one party to a lawsuit demands jury trial of "any issues triable as of right by a jury" no other party is required to make a demand for jury trial, and the case will stand for trial to a jury upon all issues,

including those presented by crossclaims of defendants. It is only when one party limits his demand to specified issues that other parties are required to file a demand. That such was the intention of the framers of the Rules of Civil Procedure is further shown by paragraph (d) of Rule 38, that "a demand for trial by jury, made as herein provided, may not be withdrawn without the consent of the parties." Petitioner's counsel, at the trial, objected to separate trials upon the crossclaims because to do so would deprive defendants of a jury trial (R. 298).

It is quite apparent, we submit, that respondent, Williams, having demanded a jury trial of all issues, no request for a jury trial on the crossclaims was necessary to entitle any crossclaimant to have his fact issues submitted to a jury.

Significantly, while the trial court apparently accepted the contention of respondents' counsel, the Court of Appeals for the Eighth Circuit Court did not so construe Rule 38. The decision of that Court is predicated solely upon the discretion conferred upon the trial court by Rule 42(b).

We pointed out in our original petition that the Federal Rules of Civil Procedure contemplate a single trial of all issues, including crossclaims, unless an order for separate trials of particular issues is made in advance of the trial. In the case at bar the trial court made no order for separate trials, as such, but merely excluded all of petitioner's evidence which he felt pertained to the crossclaims. The discretion to order separate trials of particular issues obviously means a judicial discretion,

not an unlimited discretion, or a discretion to be exercised in an arbitrary or capricious manner.

In the case at bar, the action of the trial court in effect making an order for separate trials while ruling upon the admissibility of evidence tendered by petitioner, as we have pointed out, materially changed the scope of the issues on trial after all of plaintiff's evidence in chief had been introduced. No case, even remotely sanctioning such arbitrary procedure in a jury trial, has been found by counsel on either side.

Counsel for Respondent Williams cite but two cases on this phase of the matter, and Union Pacific's counsel cite but one. The case of *United States v. Yellow Cab Company, et al.*, 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523, does not support respondents' contentions. In that case four passengers in a Philadelphia taxicab were injured when it collided with a U. S. mail truck, and they sued the cab company for damages in a U. S. Court. Defendant impleaded the United States as a third party defendant, as provided by the rules. The United States moved for dismissal of the action, as against it, on the ground that the Federal Tort Claims Act did not authorize joinder of the United States as a third party defendant. The District Court overruled the motion, tried the case without a jury, rendered judgment against the cab company in favor of the injured plaintiffs, and provided that, upon payment of the judgment, the cab company was entitled to judgment over against the United States for one-half the amount. This Court, speaking by Mr. Justice Burton, said:

> "If special circumstances had demonstrated the inadvisability, in the first instance, of impleading

> the United States as a third party defendant, the leave of Court required by Rule 14 could have been denied. If, at a later stage, the situation had called for a separation of the claims, the Court could have ordered their separate trial. (Fed. Rules of Civ. Proc. 42 (b)). The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings."

We submit, therefore, that the *Yellow Cab case* cited by counsel in support of the decision below, instead supports petitioner.

The other case cited is a Seventh Circuit Court of Appeals decision, *Meyercheck v. Givens*, 180 F. (2d) 221. That was an action by Meyercheck, and others, against their landlord to recover rent overcharges and attorneys' fees for violation of the Rent Control Act. Defendant contended that there was a misjoinder of parties plaintiff, and that the district court lacked jurisdiction. With respect to the joinder question, the Seventh Circuit Court of Appeals said:

> "A reading of Rule 20 (a) and (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A., makes it plain that a wide discretion is vested in the trial court relative to the joinder of parties, as well as separate trials. * * * But of more importance, no request was made of the court for separate trials by motion or otherwise, and no complaint was made as to misjoinder. The question is raised for the first time in this court."

Further comment on this phase of the case seems unwarranted. Nothing contained in the Briefs of respondents tends, in any manner, to support the unprecedented action of the trial court in ordering separate trials, after

all of plaintiff's evidence had been taken, and the record made, in reliance upon the issues as they stood at the opening of the trial.

II.

In Division II of their briefs counsel for respondents attempt to answer petitioner's claim that the courts below erred in holding petitioner, Rock Island, solely responsible for the condition of the boxcar, and in holding Union Pacific entitled to a directed verdict. With respect to these contentions counsel for Union Pacific charge at pages 3 and 4:

> "there is no evidence in this case that the railroad companies and the elevator (Williams' employer) 'pooled' the cars so supplied,"

and that

> "Union Pacific did not have possession of the car prior to the accident, did not know that it was to have the shipment over its line, and had no opportunity to make the inspection."

These statements ignore the fact that Union Pacific had sufficient possession of the car to issue the bill of lading for its transportation a few hours after Williams was injured; also ignore the evidence of Carl A. Stump, elevator superintendent that it was the usual custom to take cars, supplied by one railroad, and apply them for shipment via another line (R. 330); also the undisputed testimony of Elmer E. Smith, petitioner's local agent, who stated that the car supply at the elevator is pooled (R. 463). These contentions also ignore the admission set forth in the pleadings of Union Pacific that, on many occasions, cars sent to the elevator by one railroad were

shipped out via other lines (R. 73), and Union Pacific was aware of that custom.

Counsel for respondents have made certain concessions which, it appears to us, very definitely simplify the questions presented by the second division of our petition.

First: At page 15 of their brief counsel for Williams say:

> "As the petitioner knows, a switching carrier has no duty to inspect, and, therefore, has never been held liable for a defective car. It seeks to have itself so classified."

In view of this concession, if the position of petitioner Rock Island, at the time of Williams' injury was that of a mere switching line we are in agreement with counsel for respondent that Rock Island is in no manner liable, because it was under no duty to inspect, or otherwise exercise care for Williams' safety. We have contended throughout this litigation, that petitioner *at the time of Williams' injury* was a mere switching agent for Union Pacific.

Second: Counsel for both Williams and Union Pacific vehemently deny that they have ever contended, or now contend, that Rock Island's position as a switching line, moving the car from the elevator to Union Pacific makes it responsible for the condition of the car. This concession is very helpful to a proper disposition of the questions presented.

We have pointed out in our petition that although the boxcar in question was sent to the elevator by Rock Island in response to an order from Kansas Grain for

empty cars for loading, Kansas Grain loaded the car for outbound movement via Union Pacific, because the grain Company had so contracted with its vendee Houlton Grain Company. See evidence of James K. Franks (R. 336-338 and R. 463 and 464) and Exhibits 19 and 20 reproduced R. 465 and 467.

Under these facts then it is undisputed that Kansas Grain took Rock Island Car 145287 and used it exactly as though it had been supplied by Union Pacific in the first instance, with the acquiescence of both Rock Island and Union Pacific. It seems apparent to us that Kansas Grain by taking the car for its own use in connection with its business with Union Pacific, necessarily changed Rock Island's legal position with respect to the car. Rock Island became a purely switching line, and Union Pacific stepped into the place which Rock Island had occupied. Union Pacific became the supplier of the car, because it was being used in its business, and not that of Rock Island.

It is perfectly apparent, of course, that at some stage of this transaction Union Pacific became primarily responsible for the condition of the car, and for practical purposes made the car its own. The Court of Appeals for the Eighth Circuit has held that Union Pacific had no responsibility for the car until it signed the bill of lading; therefore, Union Pacific was entitled to a directed verdict. This ruling disregards the fact that cars must be loaded, that loading is a part of the outbound movement, and that cars are never billed until loading has been completed. It overlooks the sound and just rule of law that no one may accept all benefits of

a business transaction without also accepting responsibilities. This rule was embodied in petitioner's requested instructions five and six, refused by the trial court (R. 358).

We freely concede that Rock Island, when it sent Car 145287 to the elevator for loading with grain for movement over its railroad owed a duty to exercise reasonable care to supply a car reasonably safe from defects. We concede that if an employee of the elevator had been injured by the defective condition of the car while it was being switched into the elevator, or before the elevator took the car for use of another railroad, then Rock Island should bear the responsibility. But Rock Island certainly owed no duty to supply the elevator with cars for the business of Union Pacific, and we submit, after loading of the car for outbound movement via Union Pacific, Rock Island's obligation was at an end, and the railroad which was then using the car became responsible for its condition. No just rule of law will permit Union Pacific to accept all the pecuniary benefits from the use of a car without assuming responsibility for it.

At pages 13 to 15 of their brief counsel for Union Pacific attempt to answer petitioner's claim that the decision of the Eighth Circuit Court of Appeals conflicts with that of the Iowa Supreme Court in *Jackson v. Chicago, M., St. Paul & P. R. R. Co.*, 238 Iowa 1253, 30 N. W. (2d) 97. Counsel for Union Pacific concede, as they must, that the Iowa Court there said that the duty of inspection rests upon the initial carrier of a car to provide against injuries to the employees of both consignor

and consignee. Counsel say at pages 14 and 15 of their brief:

> "Obviously, you could not apply the term 'initial carrier' to a line which was not the initial carrier at the time of the accident, as was the situation with Union Pacific. The only carrier relationship, as we have pointed out, at the time or prior to the accident aside from the switching by Northwestern, was by the Rock Island."

We desire to first consider Union Pacific's status with respect to Car 145287. It must be remembered that Williams' injury was sustained after the loading of the car for outbound movement had been completed, and while Williams was attempting to close the door of the car. The undisputed evidence shows that the elevator company had contracted to ship this car to Denver, Colo., via Union Pacific. The occasion for Williams' presence about the car was that as an employee of the elevator he was performing the last essential act before physical transportation of the car commenced. Union Pacific was named in the bill of lading as the sole and only carrier. It received the whole revenue from the car, paying Rock Island for its switching service. Under these conditions which railroad was the "initial carrier" of this car? The car was not loaded by the elevator for movement via Rock Island. Rock Island never signed the bill of lading. Union Pacific executed the bill of lading when tendered to it, in the usual course of business just a few business hours after Williams' injury. If we apply the usual meaning to the words "initial carrier" it is perfectly clear that Union Pacific is the only party to which the term can be applied. As the *sole and only* carrier named

in the bill of lading Union Pacific was both the "initial carrier" and the "delivering carrier." It, and it alone, was the carrier with which the consignor of the car had dealings. The Iowa Supreme Court in the *Jackson* case plainly stated that the duty of inspection rested upon the "initial carrier." Had the Court meant to say something entirely different why did it not do so?

Furthermore, it must be borne in mind that the initial carrier is charged with the legal duty of furnishing or supplying a car for movement via its line. The undisputed evidence in the record shows that as to every industry on the Rock Island in the Omaha-Council Bluffs area, except Kansas Grain the initial carrier actually supplies the car to the industry for loading. This practice is in accord with Rock Island Exhibit 22 (R. 434-435), which expressly states that "it is the right and obligation of the line haul carrier" (here Union Pacific) to supply an empty car for loading by an industry served by a switching line.

We desire to point out that the Iowa Supreme Court in its *Jackson* decision did not say that an initial carrier of a car was under a duty to inspect, and otherwise exercise due care, except in cases where a car has been sent to the consignor's place of business by a third party. This exception has been applied, however, by the Court of Appeals. It is quite apparent that the Court of Appeals in the case at bar has held the initial carrier of the car entitled to a directed verdict, contrary to the Iowa Supreme Court's pronouncement in the *Jackson* case.

It is equally plain that the decision below in holding Union Pacific exempt from liability for Williams' injury has departed from a long line of decisions in practically all of the Circuit Courts of Appeal, including the Eighth Circuit itself. As we have heretofore pointed out the courts have generally held that the duty of a railroad arises out of the fact that a business relationship exists between the railroad and the consignor or consignee of a car transported over the railroad's line. Never has a Court of Appeals held a railroad liable except when there was a carrier-shipper or carrier-consignee relationship present.

Counsel urge that the liability of a railroad arises ex delicto and not ex contractu; and they seem to feel that such fact imposes a liability on petitioner and absolves Union Pacific. As stated in the *Hummel* case, 167 F. 89, the shipper-carrier relationship creates the condition out of which the law creates the duty to exercise care. When the elevator company, with the consent of Union Pacific, took the car supplied by Rock Island and used it in its business dealings with Union Pacific, Union Pacific stepped into the position previously occupied by Rock Island and Rock Island had no more responsibility than the Sante Fe Railroad would have had for a car supplied to the elevator by Union Pacific.

Counsel for Williams say that we have abandoned our claim against Chicago and North Western. This is not correct. Our position is, and always has been, that both Rock Island and North Western were merely switching railroads and that primary liability for Williams' injury is with Union Pacific. We have not asked this Court

to determine the legal issue as to whether under the contract between the parties North Western is under obligation to Rock Island.

We believe that the controlling question is — Upon whom does primary responsibility for the condition of the car *at the time of Williams' injury* rest? If the duty is imposed upon the initial carrier, as the Iowa Supreme Court has held in the *Jackson* case, then the Court of Appeals was manifestly in error in holding Union Pacific owed no duty to Williams and was entitled to have its motion for a directed verdict sustained. If the duty rests upon the initial carrier then Rock Island was entitled to a directed verdict, or in the alternative to now have judgment over against Union Pacific.

If both railroads were under a joint obligation then the Court of Appeals was wrong because it is conceded that Iowa now follows the rule of contribution between joint tort feasors contrary to the earlier pronouncements of its Supreme Court.

We submit that the questions presented by the petition justify a hearing of the case upon its merits by this Court. We pray that the petition for certiorari be granted, and that this Court reverse the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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